NO. 83-39

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

T.N.T. MARINE SERVICE, INC.,
*Petitioner*

v.

WEAVER SHIPYARDS AND DRYDOCKS, INC.,
*Respondent*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

R. SCOTT HOGARTY
800 Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151
*Attorney for Respondent*

*Of Counsel:*

J. ERIC TOHER and
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

## QUESTION PRESENTED

Whether or not, under the facts and circumstances of the case, the district court properly denied plaintiff a trial by jury where jurisdiction was invoked by plaintiff on the alternative bases of diversity of citizenship (28 U.S.C. § 1332) and admiralty (28 U.S.C. § 1333).

## LIST OF ALL PARTIES TO THE PROCEEDINGS IN THE DISTRICT COURT AND COURT OF APPEALS

Petitioner, T.N.T. Marine Service, Inc.

Respondent, Weaver Shipyards and Drydocks, Inc.

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**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION

*To The Honorable Chief Justice And The Associate Justices Of The Supreme Court:*

Respondent, Weaver Shipyards and Drydocks, Inc. (hereinafter referred to as "Weaver"), respectfully submits this its Brief in Opposition to Petitioner's Petition for Writ of Certiorari and respectfully prays that the Court deny issuance of the writ.

## JURISDICTION

Respondent acknowledges that the Court has discretionary jurisdiction to grant the writ under 28 U.S.C. § 1254(i), but Respondent submits that there are no "special and important reasons," as required by Rule 17.1 of the Rules of the Supreme Court of the United States, for issuance of a writ in this case.

## STATUTES AND RULES INVOLVED

1. 28 U.S.C. § 1332 (1956)—Diversity of citizenship; amount in controversy; costs.

(a) The District Courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000.00, exclusive of interests and costs and is between—

(1) citizens of different States;

2. 28 U.S.C. § 1333 (1949)—Admiralty, maritime and prize cases.

The District Courts shall have original jurisdiction, exclusive of the Courts of the States, of:

(1) Any civil case of admiralty or maritime jurisdiction saving to suitors in all cases all other remedies to which they are otherwise entitled.

3. Fed. R. Civ. P. 9(h) — Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the District Court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cog-

nizable only in admiralty it is an admiralty or maritime claim for those purposes whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15. (As amended Feb. 28, 1966, eff. July 1, 1966).

## STATEMENT OF THE CASE

In late December, 1976, the M/V CAPE SAN JUAN was brought by Petitioner, her owner, to Respondent's facility in Orange, Texas. Petitioner initially alleged that the vessel was brought to Respondent's facility so that Respondent could perform various requested repairs to said vessel. Respondent has consistently denied Petitioner's allegations that Petitioner had requested Respondent to repair the vessel and that Respondent had agreed to repair the vessel. Rather, Respondent has consistently maintained that Petitioner's president requested that he be allowed to moor the CAPE SAN JUAN at Respondent's facility so that he and his crew could perform the necessary repairs and maintenance themselves. Because of the personal friendship of Petitioner's president and the president of Respondent's parent corporation, Respondent gave permission to Petitioner's president to moor the vessel at the facility. Such permission was given gratuitously. In addition, Respondent has consistently maintained that no bailment relationship existed between Respondent and Petitioner in respect to the CAPE SAN JUAN. In fact, Petitioner maintained a crew member on board the vessel for most of the time the vessel was moored at Respondent's facility. When Petitioner's president was attending and working on the vessel, he slept on board the vessel.

In the early morning hours of April 28, 1977, the CAPE SAN JUAN sank while unattended. The crew

member who had been on board had recently been sent home to a foreign country. Petitioner's president, who had been in attendance at the vessel and who had on such occasions slept on board the vessel, had instead spent the night of April 27/28, 1979 at a motel in Beaumont, Texas, approximately thirty miles from the site of Respondent's facility. There were no eyewitnesses to the sinking.

As is evident from Petitioner's Complaint, Petitioner alleged causes of action based on breach of contract, both civil and maritime, and based on tort. In addition, Petitioner brought an *in rem* admiralty action against a vessel owned by Respondent. Petitioner invoked diversity jurisdiction pursuant to 28 U.S.C. § 1332. Petitioner further alleged "this is also a suit for breach of a maritime contract and for maritime tort." (See Appendix I —Complaint of Plaintiff T.N.T. Marine Service, Inc., Paragraph II.) This was an express, alternative invocation of admiralty jurisdiction, pursuant to 28 U.S.C. § 1333. Petitioner, both in its Brief to the United States Court of Appeals for the Fifth Circuit and in its Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, has admitted that its Complaint invoked both diversity jurisdiction and admiralty jurisdiction.

Prior to trial, Respondent moved to strike Petitioner's jury request. The district court granted such request in view of the alternative jurisdictional bases under which Petitioner brought its causes of action. At no time prior to or at trial did Petitioner ever amend or seek to amend its pleadings so as to drop its allegation of admiralty jurisdiction. At no time did Petitioner evidence any desire to waive or dismiss its *in rem* cause of action.

At trial, at the close of Petitioner's case-in-chief and after Petitioner rested, the district court announced its rulings, which were subsequently formalized in the court's Judgment and in its Findings of Fact and Conclusions of Law, and dismissed Petitioner's claims. Those conclusions will be discussed more extensively in Section III, *infra,* but simply stated the district court held as a matter of law that Petitioner failed to establish liability on the part of Respondent. In direct contradiction to the assertion of Petitioner in its Petition for Writ of Certiorari (at p. 5), the CAPE SAN JUAN did not sink because of negligence on the part of Respondent.

Petitioner appealed the decision to the United States Court of Appeals for the Fifth Circuit on two points: that the district court erred in denying Petitioner a jury trial and that the district court's finding and conclusion that no bailment existed was clearly erroneous. The court of appeals affirmed the decision of the district court.

The sole issue being presented by Petitioner to this Court is whether the district court improperly denied it a trial by jury.

## SUMMARY OF ARGUMENT

Petitioner pursued its claim in admiralty by bringing an *in rem* action against the Tug OCEAN WIND and by proper invocation of admiralty jurisdiction under Federal Rule of Civil Procedure 9(h). There is no conflict among the courts of appeal as the courts of the various circuits agree that invocation of admiralty jurisdiction under Federal Rule of Civil Procedure 9(h) carries with it the traditional admiralty procedure of a trial to the court. In any event, even if Petitioner was wrongfully denied a

trial by jury, such denial is legally irrelevant as the district court's decision dismissing the Petitioner's causes of action was made as a matter of law. The Petition for Writ of Certiorari should be denied because the decisions of the United States District Court for the Eastern District of Texas and the United States Court of Appeals for the Fifth Circuit are correct. The Petition for Writ of Certiorari should also be denied because there are no "special and important reasons" as required by Rule 17.1 of the Rules of the Supreme Court of the United States for the issuance of a writ in this case as there is no conflict among the United States Courts of Appeal on the issue in this case. Finally, the Petition for Writ of Certiorari should also be denied because the rulings of the district court in respect to the merits of Petitioner's case, which are rulings not challenged by Petitioner, were made as matters of law and not merely as matters of fact.

## ARGUMENT

### I.

### Petitioner Pursued its Claim in Admiralty by Bringing an *In Rem* Action Against the Tug OCEAN WIND and by Proper Invocation of Admiralty Jurisdiction Under Federal Rule of Civil Procedure 9(h).

Petitioner, T.N.T. Marine Service, Inc., filed its Original Complaint as an action *in personam* against defendant, Weaver Shipyards and Dry Docks, Inc., and as an action *in rem* against the Tug OCEAN WIND. The complaint averred that the action was of a civil nature, invoking the district court's diversity jurisdiction under 28 U.S.C. § 1332, and also averred that the action was "for breach of a maritime contract and for maritime tort." Proper

invocation of the district court's admiralty and maritime jurisdiction under 28 U.S.C. § 1333 was admitted by Petitioner in its Brief to the United States Court of Appeals for the Fifth Circuit, and is not denied in its petition to this Court. At no time did Petitioner elect to amend its Original Complaint to eliminate either its *in rem* action against the Tug OCEAN WIND, or its invocation of admiralty and maritime jurisdiction.

Federal Rule of Civil Procedure 9(h) provides in pertinent part as follows:

> Rule 9. Pleading Special Matters.
>
> * * *
>
> (h) Admiralty and maritime claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for those purposes, whether so identified or not. The amendment of a pleading to add or withdraw an identifying statement is governed by the principles of Rule 15.

Identification of a claim as one within the purview of Rule 9(h) does not require specific mention of the rule itself; a statement identifying a claim as an admiralty or maritime claim is sufficient. This liberal approach is in accordance with the general intention of simplification in pleading found in Federal Rule of Civil Procedure 8(e)(1).

Rule 8. General Rules of Pleading.

* * *

(e) Pleading to be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

The identifying statement of Rule 9(h) arose from the need to retain certain traditional admiralty procedures upon unification of the civil and admiralty rules in 1966. As stated in the Advisory Committee Notes to Rule 9(h):

> After unification has abolished the distinction between civil actions and suits in admiralty, the complaint in such an action would be almost completely ambiguous as to the pleader's intentions regarding the procedures involved. The allegation of diversity of citizenship might be regarded as a clue indicating an intention to proceed as at present under the savings to suitors clause; but this, too, would be ambiguous if there were also reference to the admiralty jurisdiction, and the pleader ought not to be required to forego mention of all available jurisdictional grounds.
>
> Other methods of solving the problem were carefully explored, but the Advisory Committee concluded that the preferable solution is to allow the pleader who now has power to determine procedural consequences by filing a suit in admiralty to exercise that power under unification, for the limited instances in which procedural differences will remain, by a simple statement in his pleading to the effect that the claim is an admiralty or maritime claim.

Petitioner had the option of bringing its *in personam* claim as a civil action entirely within the diversity juris-

diction of the district court pursuant to the savings to suitors clause of 28 U.S.C. § 1333(1). *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines,* 369 U.S. 355, 82 S.Ct. 780, 7 L.Ed.2d 798 (1962). In *Ellerman,* the plaintiff brought an admiralty action for breach of maritime contract on the law side of the court, basing jurisdiction entirely on diversity under 28 U.S.C. § 1332. The Court summarized the plaintiff's right to do so as follows:

> Congress since 1789, in giving Federal District Courts original jurisdiction of civil cases in admiralty, has saved "to suitors in all cases all other remedies to which they are otherwise entitled." 28 U.S.C. § 1333(1). . . . Therefore, a suit for breach of a maritime contract, while it may be brought in admiralty, may also be pursued in an ordinary civil action, since, unlike the proceeding in *The Moses Taylor,* 4 Wall. 411, 18 L.Ed. 397, it is a suit *in personam.* "Where the suit is *in personam,* it may be brought either in admiralty or, under the saving clause, in an appropriate non-maritime court, by ordinary civil action." Gilmore and Black, The Law of Admiralty (1957), p. 36.

*Id.* at 359-60, 82 S.Ct. at 783-84, 7 L.Ed.2d at 804 (footnotes omitted). The Court pointed out that when an admiralty action is brought at law under diversity jurisdiction, a right to trial by jury accrues. Petitioner in the instant case, however, chose to identify its claim not only as a civil claim under diversity jurisdiction, but also as an admiralty claim pursuant to Rule 9(h). By opting to identify its claim as an admiralty claim, Petitioner elected to be governed by the procedural consequences flowing from Rule 9(h); in particular, Petitioner elected to be governed by Federal Rule of Civil Procedure 38(e), which provides:

Rule 38. Jury Trial of Right.

* * *

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 9(h) is not a harsh rule because a plaintiff, as noted in the Advisory Committee Notes to Rule 9(h), may elect to amend its pleading and remove the statement identifying the claim as an admiralty or maritime claim, in accordance with the liberal amendment rules of Federal Rule of Civil Procedure 15. A plaintiff may thereby rightfully make a claim for a jury trial. Petitioner did not elect to so amend its pleading, even subsequent to the denial of its request for jury trial, and so must be assumed to have intended to retain its admiralty election and the concomitant procedural consequences.

Petitioner also sued the Tug OCEAN WIND *in rem*. An *in rem* action is traditionally maritime in nature and has no equivalent common law counterpart. *The MOSES TAYLOR v. Hammons,* 4 Wall. 411, 18 L.Ed. 397 (1867). Therefore, petitioner's choice of an *in rem* proceeding would have mandated a traditional non-jury trial, traditional admiralty actions and their procedural consequences being retained by Rule 9(h) in the unification of civil and admiralty rules. As stated in the Advisory Committee Notes to Rule 9(h):

> It is no part of the purpose of unification to inject a right to jury trial into those admiralty cases in which that right is not provided by statute.

Petitioner did not choose to sever or eliminate through amendment its *in rem* claim, indicating clearly that its

intention was to retain the advantages of admiralty procedure in both an *in rem* action and under Rule 9(h). Petitioner must also be constrained to the procedural consequence of a non-jury trial.

Petitioner claims in its Petition to this Court that it did not take advantage of any admiralty procedures in its initial action in district court. However, Petitioner clearly took advantage of its ability to threaten seizure of the Tug OCEAN WIND pursuant to its *in rem* claim. While it is true that Petitioner withheld actual seizure of the vessel, it did not forego entirely its right to seize, as Supplemental Rule E of the Supplemental Rules for Certain Admiralty and Maritime Claims in the Federal Rules of Civil Procedure provides that a claimant may hold in abeyance seizure of a vessel by so requesting. Petitioner held out the threat of seizure until assured that the claimant of the vessel would appear, answer and defend. Actual seizure of a vessel is not necessary to maintain an *in rem* action. *Jones v. The RICHMOND*, 13 Fed. Cas., No. 7,492 (S.D.N.Y. 1858). As stated in *Jones*, "the personal appearance of the defendants, by stipulation and answer, is equivalent to an attachment of the property itself." *Id.* Respondent filed its Claim to A Vessel, answering and agreeing to defend against the *in rem* claim. Respondent's claim to the Tug OCEAN WIND rendered unnecessary actual seizure of the vessel prior to trial of the action. Petitioner cannot claim not to have taken advantage of admiralty procedures when it obtained defendant's answer and claim to the Tug OCEAN WIND by the implicit threat of seizure.

Clearly, Petitioner availed itself of the admiralty procedures flowing from an *in rem* claim, and properly invoked admiralty jurisdiction under Rule 9(h). Therefore,

Petitioner must be required to follow all of the procedural consequences of its jurisdictional choice, and must not be allowed to pick and choose the procedural advantages of civil and admiralty jurisdiction and thereby render meaningless the proper invocation of federal admiralty jurisdiction.

Apart from the foregoing, what Petitioner chose or chose not to do is legally irrelevant. Petitioner made available remedies and procedures peculiar to admiralty by pleading as it did. Whether it chose to actually employ those remedies and procedures is of no consequence to the issues under consideration here.

## II.

**There is no Conflict Among the Courts of Appeal as the Courts of the Various Circuits Agree That Proper Invocation of Admiralty Jurisdiction Under Federal Rule of Civil Procedure 9(h) Carries with it the Traditional Admiralty Procedure of a Trial to the Court.**

The courts of the various circuits are in agreement that proper invocation of admiralty jurisdiction under Rule 9(h) carries with it the procedural consequence of a non-jury trial. In *Americana Co. of Puerto Rico, Inc. v. Transocean Tankers Corp.*, 317 F. Supp. 798 (D. Puerto Rico 1969), the district court stated that a complaint alleging jurisdictional grounds of admiralty and diversity, without specific mention of Rule 9(h), left "no doubt that plaintiff, through the allegations of its complaint, has clearly chosen to assert and identify its claim for relief as an admiralty or maritime claim within the meaning of Rule 9(h), Federal Rules of Civil Pro-

cedure." *Id.* Consequently, that court held that, pursuant to Federal Rule of Civil Procedure 38(e), plaintiff was not entitled to a jury trial, and defendant's motion to strike plaintiff's demand for a jury trial was granted. The decision in *Transocean Tankers* mandates a similar result in the instant case.

In *Alaska Barite Co. v. Freighters, Inc.*, 54 F.R.D. 192 (N.D. Cal. 1972), the district court, citing *Transocean Tankers, supra,* stated in denying a defendant's demand for a jury trial on its counterclaim at law to plaintiff's properly invoked Rule 9(h) admiralty claim, "[t]he purpose of Rule 9(h) is to allow the moving party, who could either bring suit under admiralty or civil law, to clearly elect which form of proceeding he chooses." *Id.* at 194. The result, the court went on to state, is that "Rule 9(h) when properly elected prevents either party having a jury trial." *Id.*

In *Williams v. Shipping Corp. of India, Ltd.*, 354 F. Supp. 626 (S.D. Ga. 1973), the district court, also citing *Transocean Tankers, supra,* stated that "[w]here a plaintiff in a maritime tort case bases jurisdiction both on admiralty and on diversity grounds, but identifies the claim as one in admiralty, in accordance with Rule 9(h), his demand for a jury trial will be stricken." *Id.* at 629. The court went on to point out that the election to proceed under admiralty procedures is not an irrevocable election. Where an equivalent action at law based on diversity jurisdiction is available and is properly pled, and the statement identifying the claim as an admiralty or maritime claim is withdrawn, plaintiff may proceed with a proper request for jury trial. In *Williams,* the plaintiff merely added diversity jurisdiction and did not withdraw its admiralty claim. The court found that reli-

ance on both admiralty and diversity jurisdiction constrained plaintiff to traditional admiralty procedures and struck plaintiff's request for a jury trial. *See also Gilmore v. Witschorek,* 411 F. Supp. 491 (E.D. Ill. 1976).

The United States Court of Appeals for the Fifth Circuit is in direct accord with the preceding line of cases. In *Romero v. Bethlehem Steel Corp.,* 515 F.2d 1249 (5th Cir. 1975), the court of appeals stated:

> The unification of the admiralty and civil rules in 1966 was intended to work no change in the general rule that admiralty claims are to be tried without a jury. . . . Fed. R. Civ. P. 9(h) serves only as a device by which the pleader may claim the special benefits of admiralty procedures and remedies, including a non-jury trial, when the pleadings show that both admiralty and some other basis of federal jurisdiction exist.

*Id.* at 1252. The court discussed the common understanding that an admiralty action cognizable on the law side may be brought in federal court on diversity jurisdiction pursuant to the savings to suitors clause, and concluded that, had the plaintiff desired, he "could have obtained a jury trial on all claims simply by omitting or withdrawing the 9(h) designation in his complaint and bringing his *entire* suit as a civil action." *Id.* at 1254 (emphasis added). *See also, Powell v. Offshore Navigation, Inc.,* 644 F.2d 1063, 1066, *reh. den.,* 648 F.2d 1351 (5th Cir. 1981). It is perfectly clear from Rule 9(h) and *Transocean Tankers, supra,* that a 9(h) designation may be accomplished by a simple statement identifying a claim as an admiralty or maritime claim, and need not be made by the incantatory recitation of "Federal Rule of Civil Procedure 9(h)." Removal of a statement identifying a

claim as an admiralty or maritime claim accomplishes removal of a 9(h) designation.

In a conclusion apropos to the instant case, the court in *Romero, supra,* stated:

> [Romero] persistently refused to seek an amendment aimed at withdrawing the admiralty identification. We can find no logical purpose for this refusal in the face of his repeatedly professed desire for a jury.

*Id.* at 1254. Petitioner claims to have followed the *Romero* instructions in order to obtain a jury trial, yet Petitioner persistently refused to withdraw its admiralty identification. Had it indeed followed *Romero,* it would have brought its *entire* claim as a civil action under diversity jurisdiction. The only conclusion to be reached from Petitioner's failure to amend is that it desired to retain the procedural advantages of an admiralty action. Therefore, consistent with such procedure, Petitioner must be constrained to a non-jury trial.

Petitioner attempts to confuse the issue presented to this Honorable Court by claiming that *Fitzgerald v. United States Lines Co.,* 374 U.S. 16, 83 S.Ct. 1623, 10 L.Ed.2d 720 (1963), and its progeny, govern. *Fitzgerald* was a narrow decision, however, sanctioning only "a consolidated jury trial for an admiralty claim for maintenance and cure and a Jones Act claim for damages, both arising from the same injury and asserted by the same plaintiff against the same defendant." *Blake v. Farrell Lines, Inc.,* 417 F.2d 264 (3d Cir. 1969).

A jury trial is part and parcel of the remedy in a claim pursued under the Jones Act, 46 U.S.C. § 688. *See Schulz v. Pennsylvania Railroad Co.,* 350 U.S. 523, 76 S.Ct.

608, 100 L.Ed. 668 (1956). The Court in *Fitzgerald, supra,* stated that "since Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone." 374 U.S. at 21, 83 S.Ct. at 1650, 10 L.Ed.2d at 725. Rather than sever the claims, in the interest of judicial economy the Court in *Fitzgerald* found it reasonable to try the Jones Act claim and the maintenance and cure and unseaworthiness claims, considered "essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments," to a single trier of fact. *Id.* The logical choice for the trier of fact was the jury, mandated as part of the remedy included within the Jones Act.

In the instant case, in contrast to a Jones Act case, a jury trial is not part and parcel of a Congressionally mandated remedy. Rather, a jury trial is a procedural choice which may be made in a traditional *in personam* admiralty claim by bringing the action on the law side of the court pursuant to the savings to suitors clause of 28 U.S.C. § 1333. Where, as in this case, the decision is made by the plaintiff to pursue its claim in admiralty, the procedural choice concomitant with that decision is a non-jury trial. Petitioner should not be free to remand that decision by circumventing the procedures provided for proper invocation of a jury trial, thereby undermining traditional admiralty jurisdiction and procedure.

The courts of appeal of the various circuits are in agreement with *Fitzgerald, supra,* in allowing a jury trial in the limited instance of admiralty claims joined with a Jones Act claim. *See e.g., Simko v. C&C Marine Maintenance Co.,* 594 F.2d 960 (3d Cir.), *cert. den.,* 444 U.S. 833, 100 S.Ct. 64, 62 L.Ed.2d 42 (1979); *Peace v.*

*Fidalgo Island Packing Co.*, 419 F.2d 371 (9th Cir. 1969); *Haskins v. Point Towing Co.*, 395 F.2d 737, *aff'd after remand*, 421 F.2d 532 (3d Cir.), *cert. den.*, 400 U.S. 834, 91 S.Ct. 68, 27 L.Ed.2d 66 (1970). It is clear that, as stated in *Alaska Barite, supra*, "[w]ith the exception of maritime claims where jury trials are statutorily created such as under the Jones Act, 46 U.S.C. 688, Fitzgerald v. United States Lines, 374 U.S. 16, 83 S.Ct. 1646, 10 L.Ed. 2d 720 (1963), the courts have held that Rule 9(h) was meant to preserve the admiralty non-jury practice." 54 F.R.D. at 194. Petitioner in the instant case, having properly pursued a Rule 9(h) claim, is therefore constrained to a non-jury trial.

## III.

**Even If Petitioner was Wrongfully Denied a Trial by Jury, Such Denial is Legally Irrelevant as the District Court's Decision Dismissing the Petitioner's Causes of Action Was Made as a Matter of Law.**

At the conclusion of the presentation of the Petitioner's case, after Petitioner rested, and before Respondent could move for involuntary dismissal pursuant to Federal Rule of Civil Procedure 41(b), the district court announced its decision from the bench. Its oral decision was later formalized as the court's Findings of Fact and Conclusions of Law and as its Judgment. The court held, both as a matter of fact and as a matter of law, that there was insufficient evidence to establish that Respondent was in any manner negligent with respect to the M/V CAPE SAN JUAN. (Appendix II—Findings of Fact and Conclusions of Law—Finding No. 7 and Conclusion No. 4.) The court also held, again both as a matter of fact and as a matter of law, that there was insufficient evidence

to establish that a bailment relationship existed between Petitioner and Respondent such that Respondent would have been a bailee of the CAPE SAN JUAN at the time the vessel was in Respondent's shipyard or at the time the vessel sank. (Appendix II—Findings of Fact and Conclusions of Law—Finding No. 6 and Conclusion No. 3.) Finally, the district court held, as a matter of law, that Petitioner had failed to prove by a preponderance of the evidence that Respondent was in any manner responsible for the sinking of the CAPE SAN JUAN. (Appendix II—Findings of Fact and Conclusions of Law —Conclusion No. 5.)

Petitioner appealed the district court's holding regarding the bailment issue to the court of appeals which affirmed on that and on the other point of appeal. Petitioner does not now contest the sufficiency or correctness of any of the district court's findings of fact or conclusions of law.

Although Federal Rule of Civil Procedure 41(b) regarding involuntary dismissals is by its terms applicable to actions tried to the court and Federal Rule of Civil Procedure 50(a) regarding directed verdicts is by its terms applicable to actions tried to a jury, the district court's action in dismissing Petitioner's causes of action at the close of Petitioner's case-in-chief is more closely analogous to the granting of a directed verdict than it is to the granting of an involuntary dismissal. While the court may make factual determinations in the course of deciding upon a Rule 41(b) motion, the court must consider the evidence in the light most favorable to the party moved against in determining whether a motion for directed verdict should be granted because of the legal insufficiency of the evidence produced by the party moved against. *See generally* 5 Moore's Fed. Prac. ¶ 41.13 [3]; 5A Moore's Fed. Prac. ¶ 50.03[1]. It is clear that

the standards, while very similar, do vary and that the requisite standard for a directed verdict is, if anything, stricter than that for an involuntary dismissal as any issue of credibility must be resolved in favor of the party moved against. *See, e.g., Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668 (9th Cir. 1975).

As is evident from the district court's Findings of Fact and Conclusions of Law, all determinations were made, as matters of law as well as matters of fact, based upon the sufficiency of the evidence presented, not upon the credibility of such evidence. As this Court stated in *Brady v. Southern R.R.*, 320 U.S. 476, 64 S.Ct. 232, 88 L.Ed. 239 (1943):

> When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims.

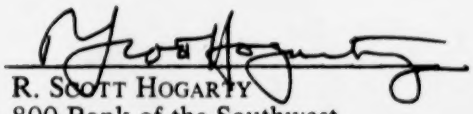
*Id.* at 479-480, 64 S.Ct. at 234, 88 L.Ed. at 243. Assessing the sufficiency of the evidence at the close of the Petitioner's case, the district court, finding the evidence to be insufficient, acted as it must and dismissed the Petitioner's causes of action. Whether Petitioner was entitled to a trial by jury or not is, therefore, legally irrelevant as its evidence was legally insufficient to prove its claims. The absence of a jury could not have adversely affected the outcome of the case from Petitioner's standpoint.

## CONCLUSION

The courts of the various circuits are in agreement with regard to the intent of Rule 9(h). When properly invoked, it gives rise to a traditional admiralty non-jury trial in accordance with traditional admiralty procedures. The various courts of appeal are also in agreement with regard to the limited exception, inapplicable in the instant case, of allowing a jury trial on admiralty claims joined with a Jones Act claim. Case law makes clear that the procedure for procuring a jury trial in an *in personam* admiralty claim is to bring such claim on the law side of the court under diversity jurisdiction or other non-admiralty jurisdiction. Case law and Rule 9(h) itself make clear the procedure for procuring a non-jury trial in a traditional admiralty action. In any event, Petitioner could not have obtained any other result even if the case had been tried to a jury as the district court's Judgment and Findings of Fact and Conclusions of Law were in the nature of a directed verdict. There is no ambiguity in the Federal Rules of Civil Procedure or confusion among

the circuits which would justify granting a writ of certiorari in the instant case.

Respectfully submitted,



R. SCOTT HOGARTY
800 Bank of the Southwest Building
Houston, Texas 77002
(713) 651-5151

*Attorney for Respondent*

*Of Counsel:*

J. ERIC TOHER and
FULBRIGHT & JAWORSKI
800 Bank of the Southwest Building
Houston, Texas 77002

## CERTIFICATE OF SERVICE

I hereby certify that I have deposited three copies of the above and foregoing Brief for Respondent in the United States Mail, first class postage prepaid, and addressed to:

Timothy F. Burr
Peter L. Hilbert, Jr.
McGlinchey, Stafford, Mintz & Celleni
600 Camp Street
New Orleans, Louisiana 70130

on this 1st day of September, 1983.

R. Scott Hogarty

R. SCOTT HOGARTY

## APPENDIX I

IN THE
UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

VS. C. A. No.:_____

WEAVER SHIPYARDS & DRY DOCKS, INC. *in personam* and against the Tug OCEAN WIND, her engines tackle, apparel, etc. *in rem*

JURY TRIAL REQUESTED

### ORIGINAL COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

The Complaint of T.N.T. Marine Service, Inc. (hereinafter referred to as T.N.T.) against Weaver Shipyards & Dry Docks, Inc. (hereinafter Weaver Shipyards) for breach of contract, civil and maritime, and for maritime tort avers on information and belief as follows:

I.

This is a suit of a civil nature as law between a citizen of a state and citizens or subjects of a foreign state wherein the amount in controversy exceeds the sum of value of TEN THOUSAND AND NO/100 ($10,000.00) DOLLARS, exclusive of interests and costs. Jurisdiction of the Court is invoked under 28 U.S.C. 1332.

II.

This is also a suit for breach of a maritime contract and for maritime tort.

III.

At all material times, T.N.T. was and now is a Florida corporation engaged in the business of towage and salvage and was and still is the owner of the steel tug M/V CAPE SAN JUAN, which vessel was at all material times tight, staunch, strong and in all respects seaworthy.

IV.

At all times, Weaver Shipyards was and still is a corporation organized and existing pursuant to the laws of the State of Texas with its principal place of business in Orange, Texas. Defendant's agent for service of process is Mike Caroll who may be served with service of process at 1905 Link, Orange, Texas.

FIRST CAUSE OF ACTION

V.

On or about April 28, 1977, the M/V CAPE SAN JUAN, while awaiting repairs and drydocking, sank at dockside in some 30 feet of water at Weaver Shipyard & Drydock, Inc. in Orange Texas. The sinking was caused by the negligence of the shipyard in its care of the said vessel. In addition, Weaver Shipyards breached its contract with T.N.T. Marine Service, Inc., by failing to properly watch and care for the M/V CAPE SAN JUAN while the tug was in the possession, custody and control of the Defendant.

VI.

As a result of said sinking, the M/V CAPE SAN JUAN was damaged necessitating repairs estimated to cost approximately ONE HUNDRED EIGHTY THOUSAND ($180,000.00) DOLLARS. In addition, Plaintiff has lost the use of said vessel, the estimated value of which is THREE HUNDRED ($300.00) DOLLARS per day.

SECOND CAUSE OF ACTION

VII.

After the sinking of the M/V CAPE SAN JUAN, certain equipment was removed and tortiously converted by Defendant for its use and for use on board the Tug OCEAN WIND.

VIII.

The estimated value of the aforementioned equipment is THIRTY THOUSAND ($30,000.00) DOLLARS, for which the Plaintiff has a maritime lien against the Tug OCEAN WIND.

IX.

Plaintiff is further entitled to reasonable attorneys fees, interest and cost.

X.

Plaintiff requests trial by jury in the case.

WHEREFORE, PREMISES CONSIDERED, T.N.T. Marine Service, Inc. prays:

1. That process in due form of law issue against Weaver Shipyards citing them to appear and answer the matters aforesaid;

2. That process according to the practice of this Honorable Court in causes of Admiralty and Maritime Jurisdiction in due form of law be issued against the Tug OCEAN WIND, its engines, tackle, apparel and equipment and that said vessel be attached, seized and sold to pay Plaintiff's claims herein.

3. That there be a judgment in favor of Plaintiff, T.N.T. Marine Service, Inc., against the Defendant, Weaver Shipyards & Dry Docks, Inc., and against the Tug OCEAN WIND, in the amounts aforesaid plus interest, costs and reasonable attorneys' fees incurred in bringing this action; and

4. That Plaintiff have such other and further relief as justice may require.

Respectfully submitted,

**By:** _____

Michael K. Clann
Attorney for Plaintiff,
T.N.T. Marine Service, Inc.
4150 Westheimer, Suite 333
Houston, Texas 77027
(713) 871-0333

OF COUNSEL

CLANN & PEARSON
4150 Westheimer, Suite 333
Houston, Texas 77027
(713) 871-0333

## APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

T.N.T. MARINE SERVICE, INC.

V. CIVIL ACTION NO. B-80-122-CA

WEAVER SHIPYARD & DRYDOCK, INC., *in personam*, and the TUG OCEAN WIND, her engines, tackle, apparel, etc., *in rem*

### FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Federal Rule of Civil Procedure 52, the Court hereby enters the following Findings of Fact and Conclusions of law:

### FINDINGS OF FACT

1. This is a non-jury admiralty suit brought by T.N.T. Marine Service, Inc. against Weaver Shipyard and Drydock, Inc. and the TUG OCEAN WIND. It arises out of the sinking of the M/V CAPE SAN JUAN on or about April 28, 1977, while it was docked at Defendant's Shipyard, and out of the alleged removal of equipment from the M/V CAPE SAN JUAN, also while it was docked at Defendant's shipyard.

2. Defendant counterclaimed seeking recovery of costs incurred in the salvage and repair of the M/V CAPE SAN JUAN.

3. Plaintiff was at all material times the owner of the M/V CAPE SAN JUAN.

4. Defendant was at all material times the owner of a shipyard and ship repair facility on the Neches River in Orange, Texas.

5. The M/V CAPE SAN JUAN sank on or about April 28, 1977 at Defendant's shipyard in Orange, Texas.

6. There is insufficient evidence to establish that a bailment relationship existed between Plaintiff and Defendant such that Defendant would have been a bailee of the M/V CAPE SAN JUAN at the time the vessel was in Defendant's shipyard or at the time the vessel sank.

7. There is insufficient evidence to establish that Defendant was in any manner negligent with respect to the M/V CAPE SAN JUAN.

8. The cause in fact of the sinking of the M/V CAPE SAN JUAN was the existence of two small holes in the vessel's hull near the keel.

9. The cause in fact of the two holes was electrolysis.

10. There was insufficient evidence to establish that Defendant's conduct was a cause in fact or a proximate cause of the electrolysis which caused the two holes in the hull of the M/V CAPE SAN JUAN.

11. On May 8, 1977, Plaintiff entered into a contract for the salvage of the M/V CAPE SAN JUAN with Golden Triangle Towing and Fueling Company. Golden Triangle rendered salvage services pursuant to that contract, the fair and reasonable value of those services in Orange, Texas, in May-June 1977 being NINETEEN THOUSAND TWO HUNDRED EIGHTY-THREE DOL-

LARS ($19,283.00). Golden Triangle was not paid by Plaintiff for those services.

12. Golden Triangle assigned its claim for those salvage services to Defendant. Defendant is entitled to recover the fair and reasonable value of those services from Plaintiff.

13. Defendant rendered repair services to the M/V CAPE SAN JUAN following salvage of the vessel. The fair and reasonable value of those repair services in Orange, Texas, in May-July 1977 was FIVE THOUSAND DOLLARS ($5,000.00).

14. Defendant was not paid by Plaintiff for those repair services and is entitled to recover the fair and reasonable value of those services from Plaintiff.

15. Defendant removed a bow fender system from the M/V CAPE SAN JUAN. The only competent evidence as to the value of the bow fender system was Defendant's admission that its fair and reasonable value in Orange, Texas, in 1977 was TWO THOUSAND DOLLARS ($2,000.00). Plaintiff is entitled to offset the value of the bow fender system from those sums it has been determined to owe to Defendant.

## CONCLUSIONS OF LAW

1. This Court has jurisdiction of the subject matter under 28 U.S.C. § 1333.

2. Plaintiff and Defendant must each prove their respective claim by a preponderance of the evidence, whether direct or circumstantial. *Skidmore v. Gruenenger*, 506 F.2d 716 (5th Cir. 1975); *Movible Offshore, Inc. v. M/V WILKEN A. FALGOUT*, 471 F.2d 268 (5th Cir. 1973).

3. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was, at any time material hereto, a bailee of the M/V CAPE SAN JUAN.

4. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was in any manner negligent in respect to the M/V CAPE SAN JUAN.

5. As a matter of law, Plaintiff failed to prove by a preponderance of the evidence that Defendant was in any manner responsible for the sinking of the M/V CAPE SAN JUAN.

6. Plaintiff is entitled to take nothing of and from Defendant by reason of its claims against Defendant. Such claims must be dismissed.

7. Defendant is entitled to take the sum of TWENTY-TWO THOUSAND TWO HUNDRED EIGHTY-THREE AND 00/100 DOLLARS ($22,283.00) of and from Plaintiff by reason of its counterclaim, such sum to bear interest at the rate of nine percent (9%) per annum from June 30, 1977 until paid.

8. All costs of Court are adjudged against Plaintiff.

9. Any Finding of Fact more properly a Conclusion of Law is hereby deemed so, any Conclusion of Law more properly a Finding of Fact is hereby deemed so.

SIGNED and ENTERED April 22, 1982.

ROBERT M. PARKER
United States District Judge